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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 388

THE CITY OF CORAL GABLES,

Petitioner

Versus

ED C. WRIGHT, ET AL,

Respondents

SUPPLEMENTAL REPLY BRIEF OF RESPONDENT, THE AMERICAN NATIONAL BANK OF NASHVILLE, TO SECOND BRIEF OF PETITIONER IN THIS CAUSE

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January 31, 1944

Brandon-Nashville

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Respondent files this Supplemental Brief, responding to Second Brief of Petitioner, and believes three questions only, are now before this Court, which are determinative, and are as follows:

QUESTION NO. 1

Was the Plan now insisted upon filed in good faith? The Plan was adopted in December, 1936; declared effective September, 1937; and filed June 27, 1490, as

Exhibit 1 to the Original Petition for Composition of Debts of City of Coral Gables.

QUESTION NO. 2

Between September, 1937, and June 27, 1940, (a) did this Plan remain in effect, and (b) was this Plan consistently observed by Petitioner?

QUESTION NO. 3

On June 27, 1940, was this Plan (a) a partially completed Plan of Composition within the meaning of Subsection (j) of the Bankruptcy Act (Title 11, USCA Sec. 403) and (b) capable of being carried out and performed if sustained?

Respondent insists the answer to each of these questions is "*NO.*"

A brief review of the facts is necessary to answer:

City of Coral Gables, a municipal corporation of Florida in the year 1930, had outstanding bonds in the principal amount of approximately Eight Million Dollars. It defaulted July 1, 1930, failing to pay all the interest due on that date and bond principal in the amount of $195,000.00. *(Rec., pp. 663-664.)*

A Bondholders Committee was formed and a deposit agreement issued, dated January 22, 1931. *(Rec.,*

p. 665.) This Committee continued to function until 1937, when exchanges were made. During the existence of this Committee interest on deposited bonds was paid to this Committee, to the exclusion of non-deposited bonds, in the amount of $504,938.25. *(Rec. p. 834).* No payments were made to other bondholders, with the exception of those fortunate enough to impound available funds. *(Rec. pp. 866,667.)*

Between July 1, 1930, and September 1, 1937, approximately twenty suits were brought against the City. *(Petitioner's Exhibit 10, Rec. p. 1422.)* Settlements were made of these claims, usually in cash, with exception of a suit by the Bondholders Committee, which was settled by refunding.

In December, 1936, a Plan of voluntary refunding, contingent upon acceptance by 90% of creditors was adopted by Coral Gables by Ordinance No. 269, which appears in full. *(Rec. pp. 57 to 95, inclusive.)* This Ordinance was amended on September 4, 1937, by Ordinance No. 289, which is not material to any question here presented, dealing only with questions of Florida law.

On December 24, 1936, a Plan for Readjustment and Composition was prepared and issued, in accordance with the Ordinance. *(Defendant's Ex. 3, p. 1482.)*

The Plan of Composition may be briefly summarized as follows:

1. On January 1, 1937, principal amounts of Bonds to be refunded amounted to $7,977,000.00 and accrued and past due interest amounted to $2,707,902.17.

2. On January 1, 1937, other indebtedness amounted to, principal $412,073.90, interest $134,317.98.

3. It was proposed to issue on January 1, 1937, Refunding Bonds to refund bonds in principal amount of $3,988,500, and for other indebtedness $206,000.00.

4. Each creditor of both classes would receive new bonds to the extent of 50% of principal and a security known as a Tax Participation Certificate (hereinafter called TPC) for remainder of principal and all interest. Holders of detached coupons or interest only were to receive TPCs only.

5. There is an express provision in Sections 5 and 6 of the Ordinance carried into the Plan, expressly providing as to all indebtedness, both bonds and other indebtedness, theretofore or thereafter reduced to judgment, that such "shall be refunded hereunder in the same manner and upon the same basis as though it had not been reduced to judgment. *(Rec. p. 63.)*

6. A Sinking Fund is provided to purchase bonds at less than par and interest, but making it man-

datory to call for tenders of bonds, and if sufficient are not received, to call and redeem bonds whenever there is $20,000.00 available.

7. Section 8 of the Ordinance makes it mandatory to levy separate and special taxes to pay bonds and interest.

8. Section 10 of the Ordinance makes provision for Tax Participation Certificates. This is a curious security, allowing a participation in surplus of taxes if there be such, having little or no value (the City by various devices virtually eliminating any payments under the terms of these Certificates.)

9. Section 12 of the Ordinance recites that delinquent taxes and special assesments for 1936 and prior years, pursuant to Agreements or proposals in former negotiations with creditors, were to be turned over to creditors, but, by the terms of this Plan, such were released to the City, but upon condition the City agree to retire varying amounts of Refunding Bonds annually, aggregating $500,000.00, and to use for this purpose not less than 60% of these delinquent tax assets liquidated *"after the calendar year 1937,"* with additional taxes to be levied if necessary. There is an express provision that "all Refunding Bonds so purchased or redeemed by the City under the terms of this section shall be promptly cancelled." *(Rec. p. 88.)*

10. The Plan provides for assessing property, collecting taxes, and enforcement of assessments.

11. Section 19 of the Plan permits the City to acquire Refunding Bonds for its own account, provided funds for such purpose are not taken from particular funds, but such bonds so acquired are prohibited from being tendered to the City as bonds called for redemption.

12. We do not consider the remaining provisions of the Plan and Ordinance material.

After the adoption of the Ordinance a proposal was made to creditors on December 24, 1936. *(Defendant's Ex. 3, Rec. p. 1482.)* This proposal follows the Plan and Ordinance consistently, but none of the three instruments call attention to the so-called "free assets" now claimed by the City.

We think it important to call attention to one of the agreements contained in the proposal, which is numbered Third and appears in the *Record at page 1509*. This section designates Central Hanover Bank & Trust Company as depository for bonds not deposited with the Creditors' Committee. (The Agent for the Creditors' Committee was Bank of New York & Trust Company.) This section continues:

> "When and if the City shall certify to said Central Hanover Bank & Trust Company as De-

positary that the holders of Ninety (90%) Percent of all unpaid principal indebtedness of the City incurred prior to November 6, 1934, have executed this document or counterparts thereof, and/or related documents * * * the City agrees to issue and deliver to the Depositary for the account of each creditor the amount of such Refunding Bonds and Tax Participation Certificates for delivery, contemporaneously with the aforesaid surrender of Certificates."

Pursuant to the foregoing provision, the City certified to Central Hanover Bank & Trust Company as depository that the requisite number of holders of bonds had assented to the plan, and thereupon executed the refunding bonds between August 20 and August 23, 1937. *(Rec., p. 682.)* Exchanges were immediately made, beginning in September, 1937, and being substantially completed about November 1, 1937. Thereafter, the record does not show any insistence upon or observance of the plan. The present bankruptcy act was in effect from August 16, 1937, and no attempt was made to coerce any bondholders. The City adopted the rule of "best trade possible," and on failing to trade in many instances submitted to judgments supported by mandatory levies and paid over the tax money so collected.

Section Ninth of the proposal *(Rec., p. 1614)* permits amendments to the plan upon agreement of the City and two-thirds of creditors, with this limitation:

"Provided, however, that no such amendment shall change the obligatory minimum tax levies, the Sinking Fund provisions or the basis of readjustment and exchange as provided for in the attached Plan."

Notwithstanding this limitation and without any agreement whatsoever, the minimum tax levies were reduced by the amount of mandatory levies, which were earmarked, set aside for, and paid to judgment creditors. This violates the plan in making a different settlement with judgment creditors and in permitting special levies for judgment creditors, in permitting preferential payments to judgment creditors, and in the lowering of the minimum tax levies provided in the plan.

One of the outstanding vices of these violations is that it reduced the value of, and distribution in reference to, Tax Participation Certificates.

The first Municipal Bankruptcy Act was declared unconstitutional May 26, 1936. The Bankruptcy Act was again amended August 16, 1937 *(U. S. C. A., Title 11, Sec. 401)* to provide for municipal bankruptcy, and was held constitutional April 25, 1938. The amendment adding Subsection (j) was approved June 22, 1938, and was held constitutional on May 1, 1940.

I.

Was the Plan Fair and Equitable?

After the default in 1930, $504,938.25 was paid to one class of bondholders, (i.e., those whose bonds were deposited) as interest, to the exclusion of other creditors. These payments were deliberately agreed to by the City. The Plan does not attempt to equalize these payments in any way.

The Plan recites that 60% of past due taxes thereafter collected by the City processes will be used for retirement of Refunding Bonds. The City, during 1937, when not obligated to retire any Refunding Bonds, sold these past due tax obligations for cash; claims that proceeds of the purchase price are "free assets" and uses these funds to make preferential payments to some creditors.

The Plan makes a distinction between principal of bonds and accrued and past due interest. In the case of *Consolidated Rock Products Co.* v. *Dubois, 312 U. S. 510, 85 L. Ed. 982, 61 S. Ct. 675,* in speaking of a similar Plan, the following language is used:

> "The instant Plan runs afoul of that principle. In the first place, no provision is made for the accrued interest on the bonds. This interest is entitled to the same priority as the principal."

The provision for interest is that it shall be paid wholly in TPCs, a novel form of security, almost, if not entirely worthless, as payments thereon, to date, have been negligible.

Prior to November, 1937, approximately twenty suits were brought against the City, which are reflected in *Exhibit 10, Record pages 1422, et seq.* Most of these suits were settled for larger amounts than paid to other like creditors under the Plan. These suits *(appearing in the Record, pages 1424 and 1425)* were adjusted and settled in the years 1937, 1938 and 1939, and after the Plan had been declared in effect. These settlements violate Sections 5 and 6 of the Plan, which provide that judgments shall be refunded on the same basis as other claims.

The Plan, the Ordinance and the Proposal, make no mention of two contracts entered into with Mr. Carl L. V. Exselsen, who was given a contract to be the exclusive representative of the City to negotiate a Debt Refunding Plan.

The services of Mr. Exselsen are the result of two contracts *(Def. Ex. 7, Rec. p. 1519 and Def. Ex. 1, Rec. p. 1470)* and his services and what was done by him are reflected and explained in a paid advertisement which appears in the record *(page 1517)*.

Mr. Exselsen attempted first to induce creditors to accept the Plan, and make exchanges as therein pro-

vided. If a creditor refused he would buy his claim for cash, purchasing both principal and accrued interest of claims for the best price he could obtain. Then, on behalf of the City and as its Agent, he would exchange the claims so purchased under the Plan and deliver refunding bonds to the City as owner. The City contends that this is fair, and the fact that these creditors received more than others is immaterial, because the payments were from "free assets" which were reserved for the express purpose of making preferential payments. This is termed good business made necessary by the necessity of putting the Plan into effect.

Whether or not the creditors ostensibly consenting actually had an interest and right to give a consent at the time is not clear. Petitioner presented a number of printed documents with signatures thereon, which it alleged were consents. Respondents undertook by interrogatories to question the parties filing these consents, but were restrained by the District Court. See Stay Order, Rec. p. 262, and Permanent Order, Rec. p. 278.)

Later, when the City Manager was testifying, he was questioned regarding this. Objections by the City were sustained, the Master holding the filing of a consent equivalent to the filing of a claim, putting the burden on the objector to file and sustain objections. (See Rec. p. 4109.)

Including claims purchased by Mr. Exselsen in former settlements, approximately 90% of the outstanding bonds and other indebtedness were refunded in the fall of 1937.

II.

Did the Plan Remain in Effect After 1937, and Was It Consistently Observed?

That no complete Plan was preserved was freely admitted in the testimony. The City Manager, Mr. Shaw, states:

> "Q. Well, there was no exact plan or formula of settlement which was adhered to at that time, but the best trade that you could make was the one you made?
>
> "A. Each of these cases was considered separately in the light of the possibilities and the necessities." *(Trans. Rec. pp. 796-798.)*

Before the foregoing question was answered, counsel for Petitioner objected, and makes this astonishing statement as to the procedure under the alleged Plan:

> "What the City did was to purchase these securities at different percentages, which is true, but they were in settlements and exchanges made under the Plan. They were purchases of securities." *(Rec. pp. 796-797.)*

The point is that the City was not authorized to make special deals with selected creditors under any guise or subterfuge. The Plan explicitly requires the treating of all creditors alike, notwithstanding the reduction of claim to judgment. The City Manager conclusively states that after the first exchanges the Plan was never observed, but the doctrine of "best trade possible" was adopted.

As shown, it is freely admitted that after the date of the Ordinance, in December, 1936, and before the Plan was declared in effect in September, 1937, special settlements were made with specially selected creditors, in the total amount of $575,000.00, and other claims were reduced to judgment to be paid out of mandatory levies, resulting in settlements in some instances on the 100% basis. *(Rec. p. 703.)*

The Court of Appeals in commenting upon the Plan, after the submission of the foregoing evidence, stated:

> "The Plan was not submitted in good faith. It is not fair to the opposing creditors. The consents of those who had taken the Refunding Bonds were not, under the circumstances the Record discloses, properly voted in its favor."

It is also significant that in the request by the City for consents, no mention is made of the preferential payments made to many creditors, and the consenting creditors were allowed to believe that they had shared equally with all others involved in the refinancing.

In 1937, with funds claimed to be "free assets" of Petitioner, Mr. Exselsen, for the account of Petitioner, expended $575,000.00, for which he purchased past due obligations of the City. As soon as these bonds and coupons and other such indebtedness came into the hands of the City, it was legally extinguished. Notwithstanding this plain rule of law that when the maker of an instrument acquires it after maturity, it is extinguished, and without the assistance of any additional Ordinance or law authorizing the re-issue of such, the Petitioner caused exchanges to be made with its two Transfer Agents and placed the Refunding Bonds it received in its treasury and has proceeded to cancel the bonds thus acquired in lieu of, and in substitution of the plain provisions for the operation of a sinking fund, which we have referred to.

The City did not at any time prior to 1940, when this Petition was filed, insist upon or attempt to coerce any creditor into acceptance of the Plan. On the contrary, it entered into a long series of lawsuits, resulting in a number of judgments against the City. Mandatory levies to pay these judgments were granted and in no instance did the City undertake to enforce the provisions of the Plan which prohibited preferential payments to these creditors, but during this period of more than two years, made the levies and paid these claims. *Defendant's Exhibit 8, Record p. 1520 to 1529*, shows in detail the bonds, coupons and other obliga-

tions purchased by the City after the Plan was declared in effect and prior to the filing of this suit.

Defendant's Exhibit 11, Rec. p. 1530, reflects the judgments obtained against the City and the mandatory levies in connection therewith.

There is an attempt on the part of the City to state that these settlements were for less than par, and were therefore good settlements. The answer is that Refunding Bonds when first issued were selling for about 50c on the dollar, and therefore a payment in cash of 50c on the dollar would permit the recipient to purchase bonds in the principal amount of 100% of the original claim. The exact amount received by these judgment creditors, which will reflect the preferences resulting, is reflected in *Exhibit 29. (Rec. p. 1629.)* And to show just what the preferences actually amounted to, we refer to *Defendant's Exhibit 47, Rec. p. 1639.*

The result of all the foregoing was that at the time Petition was filed in 1940, the following resulted:

1. Certain creditors had been paid in full.

2. Certain creditors had been paid varying amounts, but always in excess of that offered to Respondent.

3. Certain creditors had been partially paid in cash and the District Judge attempted to alter

the Plan and to permit these creditors to retain what they had received and to receive Refunding Bonds for the balance of the claim.

The District Judge held that in spite of the mandatory provisions of the Plan, that certain claimants (naming them), "each have a vested right in and to all of the monies paid to each of them by the Petitioner prior to the filing of the Petition in this cause, out of the proceeds of special earmarked tax levies made by the Petitioner for the benefit of said claimants, and that no claimants have rights which have become vested, other than those hereinabove described."

4. The provisions of the Sinking Fund and redemption of bonds have not been carried out and performed.

5. The minimum mandatory tax levies, which it is provided could not be changed or amended, have been changed by diverting a part thereof to the payment of judgment creditors in violation of the provisions of the Plan.

III.

Was This Plan a Partially Completed Plan Capable of Being Performed?

The Plan was declared in effect in 1937, when the present amendment to the Bankruptcy Law was available. No recourse was had to the Courts, and only

such exchanges were made as were (a) voluntarily made, or (b) made by the City purchasing for cash outstanding claims and then itself making the exchange and issuing Refunding Bonds, to itself, which were not cancelled but were afterwards used for a sinking fund.

City Manager, Mr. Shaw, as quoted above, states that each exchange was considered thereafter on its merits.

Section 8 of the Plan *(Rec. p. 72)* makes mandatory that minimum taxes be levied. The Ordinance provides, "There is hereby directed to be annually levied and collected a separate and special tax at the rate of * * * the proceeds of such tax levies * * * are hereby appropriated and will be paid immediately upon receipt into a special fund known as "Issue of January 1, 1937 Fund" which is hereby established and pledged to the sole and exclusive purposes hereinafter set forth, and no obligations other than those expressly provided for herein shall ever be made a charge against such fund." *(Rec. pp. 72-73.)*

No attempt was made to comply with these provisions. Levies provided for were arbitrarily reduced for the reason that there were at least nine judgments and mandatory levies. The total amount of these mandatory levies was paid to judgment creditors in violation of the Plan. The detail of this is set out in Defendant's Exhibit II *(Rec. p. 1530.)*

In addition to this large sums were paid voluntarily in making settlements. *(See Defendant's Exhibit 8, Rec. 1520, et seq.)*

Section 9 of the Plan *(Rec. p. 78)* provides for a sinking fund and continues "Monies in the sinking fund will be applied solely to the retirement of the principal of Refunding Bonds by purchase, call or payment in the manner hereinbefore directed." These sinking fund payments were never observed, but bonds illegally acquired by the City (Refunding Bonds issued to itself for past due obligations previously paid), were cancelled in alleged compliance.

Section 4 and 5 of the Plan limit the refunding of any claims reduced to judgment to the amount permitted under the Plan. This was not observed. Thousands of dollars were expended in payment of judgments, some paid in full and others in varying percentages, but in cash and in excess of permitted amounts.

Sections 10 and 11 provide for Tax Participation Certificates, which are not a direct obligation of the City, but entitle the holder to participate annually in a special fund, if there is surplus revenue from taxes. There is a covenant to levy taxes in Ordinance 269 and the Plan, sufficient in amount, so that payments into the special fund may be anticipated. *(Rec. pp. 82 and 83.)* The monies to be paid into the special

fund are the monies remaining in the "Issue of January 1, 1937 Fund" after paying interest maturing on the Refunding Bonds and sinking fund payments, and after certain reservations for future interest. *(Rec. p. 78.)*

The breach of this covenant to levy minimum taxes reduced this fund proportionately. There is no denial that this covenant was breached and that funds which otherwise would have been surplus funds, were diverted to other claims. This, among other matters, has rendered the Plan incapable of performance at this time.

This was recognized by the District Judge. He amended the Plan in his decree, without additional consents and without notice, in the following ways:

1. Those to whom preferences were paid were allowed to retain such preferences on the ground that they had a vested right therein.

2. Claimants who had received part payment in cash and proved for the balance were permitted to retain the part payment and receive bonds for the unpaid balance.

3. No provision was made for equalizing Respondent and other creditors similarly situated to those who received preferences.

4. The mandatory tax levies were arbitrarily reduced to the amounts actually levied by the City for the debt service.

5. The amounts required by the Plan to be paid into a special fund for Tax Participation Certificates were arbitrarily reduced.

We contend that the Plan was abandoned in 1937; that its restoration to full force and effect is impossible, and no such attempt was made by the District Judge. The Court of Appeals recognized this and stated in clear language that an unfair Plan, which was abandoned, could not be revived by the mere filing of a Petition.

Aside from making the Plan unfair and inequitable, the violation of Section 12 of the Ordinance, which is alleged to create "free assets," makes the carrying out of the Plan impossible at this time. A more detailed statement of what was done is:

In an advertisement appearing in a Coral Gables newspaper *(Rec. p. 1517)* Mr. Exselsen explained that in every bond settlement proposed by bondholders during six years of negotiations, delinquent tax assets were to be turned over to creditors. The advertisement continues, "However, Exselsen did NOT turn these assets over to the creditors. Instead, he secured from bondholders an express release waiving all claim to these assets, and thereby for the first time made

available to the City as FREE ASSETS, all proceeds which could be realized from the liquidation of these delinquent tax assets, either through redemption or sale. * * * After months of negotiation Exselsen secured for the City an offer from Henry L. Doherty through its subsidiary, Coral Gables Development Company, to purchase all these delinquent assets in one group for $575,000.00 in cash."

This offer was not accepted and this is laid to "the Bitter opposition of a small disgruntled group," (a Taxpayers Association). This offer was finally withdrawn or lapsed. Later the Coral Gables Development Company was prevailed upon to make a new offer, and ultimately the City received $457,691.01. Mr. Exselsen spent these and other funds and claimed the City received $845,705.42 benefit. The additional funds and this fund advanced to Mr. Exselsen totaled $575,000.00 alleged to be "free funds."

The facts in this Exhibit are testified to in detail by the City Manager, Mr. Shaw *(Rec. p. 701)* and he admits the advertisement correctly reflects the facts. *(Rec. p. 723-727.)*

This sum of $575,000.00 was not used by the City to pay creditors prorata to the limit of its ability, but was distributed to a favored few. The City justifies this by alleging it was consented to by creditors and that these preferential payments were necessary to put the Plan into effect.

ANSWERS TO QUESTIONS

We say the following are answers to our questions, based on the foregoing statement from the Record:

1. That the Plan is not fair and equitable under the provisions of the Bankruptcy Act.

2. That immediately upon the Plan being declared in effect it was abandoned and never sought to be revived until 1940, and then only for the purpose, as said by the Court of Appeals, of *bludgeoning* two creditors.

3. That no attempt to carry out the provisions of the Plan has been made since it was declared in effect.

4. That it will be impossible at this time to reassess taxes for various years and make the amounts available required by the Plan.

5. That the retirement of bonds by purchase on the open market or call has not been observed, and cannot now be corrected; and

6. That to declare a Plan effective now would necessitate a new Plan (a) validating "free assets" retained by the City, (b) validating preferential payments, (c) validating payments to creditors partly in cash and partly in bonds, and (d) declaring that the Plan so modified is a partially executed Plan, promulgated in 1937, and remaining in full force and effect thereafter.

Petitioner's brief does not insist that the Plan is fair and equitable or that it has kept the faith, but claims the "best trades possible" under the circumstances, relying upon an insistence that the Plan was accepted by the requisite number of creditors, and so long as objecting creditors receive that which the Plan provides, they cannot complain of preferential payments to others.

Securities & Exchange Commission v. *United States Realty & Improvement Company*, 310 U. S. 434, 84 L. ed. 1293, 60 S. Ct., 1044, affirmed and quoted from in *American United Mutual Life Insurance Company* v. *Avon Park*, 311 U. S. 138, 85 L. ed. 91, 61 S. Ct., 157, lays down the rule that a bankruptcy court is a court of equity guided by equitable doctrines and must grant or deny relief upon conditions which safeguard the public interest; that to permit one creditor, or group of creditors, to take advantage of another group is inequitable and against the public interest, and will bring about a denial of the relief prayed, especially, in the absence of a full disclosure of relevant facts. Here, the City has made no showing at any time that any creditor, except those receiving preferential payments were advised that this was the intention of the City, or wa sactually done, or when consents were asked in 1940, that this had been done. This is an essential part of the necessary proof in this case.

REPLY TO PETITIONER'S SECOND BRIEF

The City apparently does not answer the charges of failure to carry out its Plan. A personal attack is made on the Respondent Wright, and this Respondent for objecting to the Plan and dealing in these bonds.

The unrefunded bonds of Coral Gables, not in judgment, were freely traded in on the bond market. Various friendly brokers would purchase these bonds and make settlements from time to time with the City. At no time was this Respondent under any duty or obligation to the City, nor, so far as the record shows, was Respondent Wright. Both dealt in bonds and coupons as they had a right to do. There was no Refunding Plan in existence, as the Court of Appeals held, and the circumstances of the City after the exchanges of 1937 do not justify an appeal to the bankruptcy court. The bonds and coupons are simple debts of the City which should be paid.

No valid reason appears in this record to prevent either or both Respondents from acquiring claims and resorting to the courts, in a lawful manner in an attempt to collect. The bringing of a suit on a lawful claim in a court of competent jurisdiction is not now and never has been such an unwarranted act as to prejudice the litigant in a court of equity.

That the Argument of Petitioner is not sustained, but is contrary to Florida Law, appears in a decision

of the Supreme Court of Florida, Division A, November 9, 1943.

Town of Dundee v. *Pressgrove,*
15 So. (2d) p. 448 (Advance Sheets
No. 8 of December 9, 1943.)

In the Dundee case suit was brought to recover principal and interest on matured municipal bonds. The Municipality plead that it found itself insolvent, and proposed to creditors a Plan to compose its indebtedness, agreeing to issue Refunding Bonds in a sum equal to 60% of principal of original bonds; that all creditors accepted the Plan, except plaintiff, and that plaintiff purchased bonds sued on, with knowledge of the Composition Plan, paying less than face value for the bonds purchased. It is alleged there as here, that to permit plaintiff to recover a greater amount on its bonds than other creditors, would be inequitable. The Court held the plea "offers no legal or equitable defense to its payment, either in the hands of the plaintiff or his predecessor in title. It shows an existing contract obligation, that the plaintiff did not become a party to the Plan of Composition, and that proceedings to perfect the Plan of Composition were never perfected under the Federal Bankruptcy Act. The rule is well settled that creditors may enter into and bind themselves by a Composition Agreement * * * but it is also settled that those who do not enter into the Agreement cannot be bound thereby. (Citing authorities.) Such is the rule in this State."

Petitioner concedes in its brief that this Respondent loaned large sums of money to Ed C. Wright & Company, receiving these bonds as collateral. The Record shows that Petitioner refused to pay the claim of this Respondent shortly before the filing of the Petition. After this refusal, Ed C. Wright & Company deposited other collateral and redeemed all bonds from Petitioner, but some matured coupons were detached from the bonds and retained under pledge, on which claim was filed. That this Respondent is a legal holder of these coupons originally pledged in 1938 is not disputed. The face amount of bonds originally pledged was $225,000.00. Coupons totaling $84,282.50 were detached and retained in 1940. All bonds and other coupons were returned to the pledgor. *(Rec. p. 308.)* The coupons were received for value in 1938 and are still retained by Respondent. The claim based on these coupons has been allowed, and this allowance is not now challenged.

The City speaks of changed conditions, alleging that the retention of "free assets" and the expenditure of these assets in preferential payments did not deplete the general assets of the City; that so long as principal and interest on Refunding Bonds are paid as they mature, and so long as the minimum amount of Refunding Bonds, required under the sinking fund provisions of the Plan to be cancelled, are cancelled in each year, no creditor can complain. No legal reason for the acquisition of Refunding Bonds in exchange for

matured bonds paid by the City is set out. The cancellation of these illegally acquired Refunding Bonds to satisfy the requirements of the sinking fund is not supported in any way. No excuse for failure to acquire bonds in the open market is even attempted, although the Plan so requires.

Whenever a mandatory tax levy was obtained by a creditor to pay a judgment, the City reduced the levies required by the Plan in a smiliar amount, thus resulting in a double violation of the Plan. The City does not justify these violations.

ARGUMENT OF LAW

Petitioner divides his Argument into four divisions, and we answer each.

I.

Did the Circuit Court of Appeals Misinterpret the Purposes of Subsection 83(j) of the Municipal Bankruptcy Act?

Petitioner cites a number of cases holding that Subsection 83(j) is constitutional and valid, and whenever a partially completed and legally valid Plan of Composition exists within the meaning of the statute creditors who had previously exchanged their bonds are entitled to vote.

No real criticism is made of the language used by the Circuit Court, which is:

> "Remedial and beneficial as Subdivision (j) was intended to be, and is, when properly applied, it was not intended to, it could not constitutionally, be applied in the way attempted here, for the result of such application would be to deprive the assents of the constitutional base on which their efficacy as consents rests. That base (citing cases) is the identity of interests of those consenting with those compelled by their consents to accept the Plan. That is, that made by persons in the same situation as those against whom their votes are counted. . . . We did not, we could not, hold that where as here, a Plan has been entirely completed, and it is sought to revive it under changed conditions for the sole purpose of forcibly scaling the debts of non-assenting creditors, the consents of persons holding Refunding securities, issued under that Plan could be solicited and counted as effective consents under Subdivision (j). The Plan was not submitted in good faith. It is not fair to the opposing creditor. The consents of those who had taken the Refunding Bonds were not, under the circumstances the Record discloses, properly voted in its favor."

The Circuit Court did not depart from the holding of any reported case or those cited by Petitioner. It held, in effect, that no Plan was before the Court, because none had been filed in good faith, and further that the original voluntary plan of 1937 was completed

and abandoned and could not be revived by the mere filing of a Bankruptcy Petition. It further held in view of the showing of the preferential treatment accorded so many bondholders, that the identity of the consenting parties was too idenfinite to permit them to be counted.

The Opinion of the Court of Appeals sets out and finds the facts of this case, and there is no departure from the rules of law quoted by Petitioner.

II.

Was the Plan Submitted in Good Faith?

The Bankruptcy Act requires consents of creditors, but consents are not sufficient to sustain a Plan. The District Court must independently, and upon the Record, determine that the Plan is fair and equitable.

We have heretofore fully argued this question. We believe a showing of good faith cannot be had from this Record.

Petitioner freely admits that it did not pay to the limit of its ability.

The City sold assets mentioned in the Plan for approximately half a million dollars, which it turned over to Mr. Exselsen for the purpose of making special and preferential payments which were made. No

disclosure of this was ever made, and the Record discloses that these facts were dug out in the examination of witnesses over repeated objections by counsel for Petitioner. Petitioner justifies payments of preferences and concealment thereof, by making a distinction between (a) buying claims and (b) exchanging securities. If this is fair, equitable and permissible, then there is no restraint in the Bankruptcy Law against preferences. Petitioner boldly states, that it was good business to buy up claims at any price, and make exchanges, if by so doing, other creditors can be compelled to accept a smaller amount and the City thereby benefit.

In this section the activities of Respondents in Coral Gables refunding is shown. These activities on the part of this Respondent consisted of employing Florida counsel to attempt to negotiate with the City to compose its differences and receive an adjusted payment for its debt. It is shown that an agreement was actually reached with the City Commission, dependent, however, upon the assent of one single Commissioner, who refused his assent, resulting in suit against the City. This is the extent of the dealings of this Respondent, and we do not believe the criticism by Petitioner is justified or sustained by the Record.

We note that Petitioner says in his Brief:

> "It is not contended that these purchases (of unrefunded bond obligations) were made from

any of the creditors who are consenting or agreeing to the confirmation of this Plan of Composition."

This statement may be technically correct, but this Respondent, as heretofore shown, was precluded from ascertaining these facts, except, as the District Court pointed out, by taking the deposition of hundreds of consenting bondholders, without the use of the more expeditious and cheap way of interrogatories. The Master also declined to allow the City Manager to be questioned regarding this. This information was or should have been in the possession of the City, and should have been furnished in this cause, and it is this concealment, among other things, of which we complain. After concealing this information, the City boldly states in its Brief that Respondent does not carry the burden of showing that any of those receiving preferential treatment have now consented. The answer is, "We don't know, but attempted diligently to find out this information, and were precluded by the lower Court."

The case here is just the reverse of the case of *Ouerbacker* v. *Henderson County, 126 Fed. (2d) 309*, relied on by Petitioner. In that case, the objecting creditor had the information regarding dealings in bonds by the City and failed to produce it, and for that reason, among others, was repelled. Here the City has the information and fails to produce it after demand

has been made, and now relies upon its own failure to make this disclosure, a reason to repel Respondents.

III.

The Third Argument Is to the Effect That the Identity of Interest of Consenting Creditors and Respondents Is the Same.

The astonishing statement is made in the Brief:

> "The objecting creditors will, upon the confirmation of the Plan, receive Refunding Bonds and Tax Participation Certificates in accordance with the provisions of the Plan in the same proportionate amount as those received by the consenting creditors."

This statement is made in the face of the fact that $504,938.25 was paid to the depositing bondholders in interest and no like amount is offered to others, and no provision is made for them in the Plan. $575,000.00 of the City's funds were turned over to Mr. Exselsen and distributed as he saw fit under verbal authority from the Commission. Purchase of matured bonds and their exchange by, and for the account of, the City is not approved in the Plan. Nevertheless, purchased bonds were exchanged. The City now claims all rights and privileges of other bondholders, who exchanged under the Plan, and turns these illegally acquired bonds into the sinking fund. The City fur-

ther agrees in the Plan, not to pay preferences to judgment holders. Exhibit 1 shows thousands and thousands of dollars paid to judgment creditors after the Plan was declared in effect. The holding of the District Court that the judgment creditors, under the Plan, were entitled to retain all money paid and to prove their claim for the entire balance unpaid, stares the Petitioner in the face. Petitioner says, in effect, that it is not bound by the Plan, but that Respondents are, and if Respondents get what the Plan provides, they should be content.

Petitioner further states that consenting creditors have already voluntarily accepted the abnegations and sacrifices required by the Plan. It was pointed out by the Court of Appeals, which coined this last phrase, that those voluntarily accepting the Plan and making exchanges in their own right, were not informed of the preferential treatment of others, and therefore the consents were not in good faith.

Another statement in Petitioner's Brief, to which we direct the Court's attention, is this:

> "In this case, there is no such intention, because nothing of value will accrue to the consenting creditors as a result of the confirmation of the Plan, which will not also accrue to the non-consenting creditors."

The complaint is not that the Plan preferred one creditor over another. The complaint is that the City,

in violation of the Plan, preferred one creditor over another, and that value has accrued to some creditors whose bonds or claims have been exchanged, greatly in excess of the amount offered to Respondent. In some instances by purchase of these bonds or claims by the City for cash, and the exchange of such by the City for its own account.

IV.

Respondent Finally Complains That the Findings of Fact by the Master and the District Court Should Control.

It is claimed that the findings of the District Court should have been affirmed by the Circuit Court, quoting the dissenting Opinion of Mr. Justice Waller in the Circuit Court, and the Opinion of the Master, and not the Record, in an attempt to show the alleged errors of the Circuit Court.

The difference is hardly factual. The Master, the District Court and Mr. Justice Waller, all hold that it is not necessary for the City to pay all creditors to the limit of the City's ability to pay; that it is permissible and good business to hold back substantial sums of money for dealing with so-called "recalcitrant" bondholders, and to permit the City to exchange bonds purchased with preferential payments for its own account.

If it was necessary and permissible to pay claims in cash in 1937 and until 1940, it is necessary now to pay creditors in cash and at the same percentages. These Respondents are entitled, at least, to as good a trade as made with other creditors holding a claim on a parity with those of Respondents.

The District Court classified all admitted claims as of the same class, and further found that there was but one class of creditors, and that all were payable from ad valorem debt service taxes, without preference of one over the other *(Rec. p. 1787.)*

In view of this holding, no plan modified as this Plan is, can be sustained as fair and equitable and now capable of execution.

Respectfully submitted,

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